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No. 10-809

IN THE

Supreme Court of the United States

CHARLES FRANKLIN MURDOCH, JR., *Petitioner*,

v.

ROY CASTRO, WARDEN, AND
EDMUND G. BROWN, JR., ATTORNEY GENERAL
OF THE STATE OF CALIFORNIA, *Respondents*.

On Petition For Writ of Certiorari
To The United States Court Of Appeals
For The Ninth Circuit

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI

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PETITION FOR REHEARING

Pursuant to Supreme Court Rule 44.2, Petitioner Charles Franklin Murdoch, Jr. moves this Court for an order (1) vacating its order, entered May 16, 2011, denying his Petition for Certiorari, (2) granting the Petition for Certiorari on Question 1 presented therein, and (3) vacating the judgment of the Ninth Circuit, and remanding for further consideration in light of *Harrington v. Richter*, 131 S. Ct. 770 (2011).

1. THE INTERVENING DECISION IN *WILLIAMS V. CAVAZOS*

Based on an intervening decision of the Ninth Circuit addressing precisely the same question raised at Question 1 of his Petition for Certiorari, Mr. Murdoch reiterates his request that this Court summarily vacate the judgment of the Ninth Circuit and remand for further consideration in light of *Richter*.

One week after the denial of certiorari in this case, the Ninth Circuit published its decision in *Williams v. Cavazos*, No. 07-56127, ___ F.3d ___, 2011 WL 1945744 (9th Cir. May 23, 2011). In *Williams*, the California Court of Appeal had issued a 29-page opinion adjudicating the prisoner's claim that dismissal of a holdout juror violated state law, but the opinion failed to mention the prisoner's federal claim that the very same ruling violated the Sixth Amendment.

Under these facts, *Williams* found *de novo* review to be appropriate under *Richter*:

> It is obvious, not "theoretical" or "speculat[ive]," that Williams's constitutional claim was not adjudicated at all, and so the *Richter* presumption is overcome. [131 S. Ct.] at 785. Specifically, the portion of the court's opinion concerning the discharge of Juror No. 6 reveals that the court upheld his dismissal on the sole basis that the trial court had not abused its discretion in applying section 1089. That the court engaged in an extended discussion of Williams's *statutory* claim, but made no mention whatsoever of her more fundamental *constitutional* claim, is a compelling "indication" that the court either overlooked or disregarded her Sixth Amendment claim entirely, rather than that it adjudicated the claim but offered no explanation at all for its decision. *Cf. id.* at 785. Put differently, when a court simply says "claims denied," and nothing more, we presume the denial is on the merits and as to all claims, *see id.* at 784–785, but when a court devotes many pages to explaining its reason for denying one claim, and then says absolutely nothing that even acknowledges the existence of a second claim, "there is reason to think" that it "is more likely" that the court simply neglected the issue and failed to adjudicate the claim.

Williams, slip op. at 6718.

In arriving at this holding, the *Williams* panel, distinguished the present case in a footnote:

> In contrast, in *Murdoch v. Castro*, 609 F.3d 983 (9th Cir. 2010) (en banc), a plurality of the en banc court determined that the California Court of Appeal had "discuss[ed] and quote[d] from the section of [the petitioner's] brief in which he raised" his federal constitutional claim and had cited a state case that discussed the federal constitutional right. It therefore stated that the state court had adjudicated the petitioner's constitutional claim on the merits, even though it "addressed [the] argument only obliquely." *Id.* at 990 n. 6 (plurality opinion). Unlike in *Murdoch*, here the state court did not address Williams's claim, obliquely or otherwise, and there is not a scintilla of evidence that the Court of Appeal decided the constitutional claim, in addition to a separate claim that it discussed at length. The *Murdoch* court found an "indication" that the state court *had* adjudicated the constitutional claim on the merits; here, the total disparity between the court's treatment in the opinion of Williams's statutory claim (reasoned in detail) and her constitutional claim (not mentioned at all) provides a strong "indication" that

> the claim was never adjudicated on the merits.

Williams, slip op., at 6717 n.10 (emphasis in original).

Although *Murdoch* involved only a plurality decision, the *Williams* panel's efforts to respect and distinguish that plurality opinion—following this Court's denial of certiorari—already have injected mischief into the Ninth Circuit's post-*Richter* AEDPA jurisprudence. *Williams* squared its holding with *Murdoch* by emphasizing the complete absence of evidence of adjudication on the merits in that case, and by emphasizing the existence of some evidence of adjudication in this case.

But that is not *Richter*'s standard. *Richter* directs that the presumption of adjudication "may be overcome when there is reason to think some other explanation for the state court's decision is more likely." 131 S. Ct. at 784-85. The *Williams* panel's discussion of this case elevates the *Richter* burden from "more likely explanation" to "only explanation."

Apparently agreeing that the Ninth Circuit needs to clarify its post-*Richter* AEDPA jurisprudence, the State of California has stated its intent in *Williams* to submit a petition for rehearing with suggestion for rehearing en banc, which "will address, among other things, whether the state court made a merits adjudication for purposes of AEDPA." Appellee's Application for 14-Day Extension of Time to File Pet. for Reh'g, Decl. of Counsel ¶ 3, *Williams v. Cavazos*, No. 07-56127 (9th Cir. filed June 1, 2011).

2. APPROPRIATE RELIEF

There is an easy remedy for this case's muddying of the post-*Richter* waters. The Court can summarily vacate the judgment of the Ninth Circuit, and remand for further consideration in light of *Richter*. Such a summary order would permit the en banc panel below to determine whether its plurality opinion applied an AEDPA standard consistent with *Richter*. Indeed, should the Ninth Circuit grant en banc rehearing in *Williams*, it could consolidate the two appeals for en banc consideration.

Alternatively, this Court could see fit to grant certiorari for plenary review of the AEDPA question. As *Williams* demonstrates, this case presents a recurring fact pattern—where the California Court of Appeal issues a reasoned decision that overlooks, or at least arguably overlooks, a federal claim. This question will recur because Cal. Const. art. VI, § 14 requires that "[d]ecisions of the . . . courts of appeal that determine causes shall be in writing with reasons stated."[1] Given the sheer number of habeas corpus petitions filed in California federal courts, certiorari would be appropriate to resolve this important AEDPA question.

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[1] By contrast, because the California Supreme Court in *Richter* denied the petition without issuing an order to show cause or alternative writ, that petition did not trigger Cal. Const. art. VI, § 14. *See In re Mazoros*, 142 Cal. Rptr. 609, 610 (Ct. App. 1977).

CONCLUSION

The Court should, on rehearing, grant the petition for certiorari, and summarily vacate the judgment of the Ninth Circuit, and remand for further consideration in light of *Richter*. Alternatively, the Court should grant certiorari for plenary review of Question 1 presented in the Petition for Certiorari.

Respectfully submitted:

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RULE 44.2 CERTIFICATION OF COUNSEL

Pursuant to Rule 44.2, I hereby certify that this petition for rehearing is restricted to intervening circumstances of a substantial effect. I further certify that this petition for rehearing is presented in good faith and not for delay.

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